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13 LLC

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

13 ROOTS READY MADE GARMENTS CO.  
14 W.L.L.,

15 Plaintiff,

16 v.  
17 THE GAP, INC., a/k/a, GAP, INC., GAP  
18 INTERNATIONAL SALES, INC., BANANA  
19 REPUBLIC, LLC, AND OLD NAVY, LLC

Defendants.

No. C 07-03363 CRB

**GAP'S [REDACTED] REPLY RE  
MOTION FOR PROTECTIVE ORDER**

Date: October 19, 2007  
Time: 10:00 a.m.  
Dept: 8  
Judge: Honorable Charles R. Breyer

1       On September 12, 2007, just days after Gap filed this motion, Roots' lawyer appeared in  
 2 Paris at the deposition of Amin El Sokary in the *Gabana v. Gap* matter and purported to take Mr.  
 3 El Sokary's testimony on behalf of Roots in the *Roots v. Gap* matter. Declaration of Daralyn  
 4 Durie in Support of Gap's Reply on Motion for Protective Order ("Durie Decl."), filed herewith,  
 5 ¶ 3; Ex. C. Yet, on August 24, 2007, this Court had refused to grant Roots' request to participate  
 6 in that same deposition. In its opposition—which Roots filed just days before disregarding the  
 7 Court's ruling—Roots tries to characterize its role in the deposition of Mr. El Sokary as an  
 8 ordinary part of the ongoing discovery process in this case. For several reasons, Roots'  
 9 arguments fail.

10       First, contrary to Roots' assertions, the Court's statements at the August 27, 2007 hearing  
 11 were unequivocal. In response to Roots' request to participate in the Paris depositions in the  
 12 *Gabana v. Gap* matter, the Court stated:

13       . . . if you [Roots] can get them [Gap and Gabana] to agree that you  
 14 can attend the party [the depositions in Paris], which my guess is  
 15 you probably can't, but if you could, you know, perhaps you work  
 16 out deals that I don't even understand or never know, and maybe  
 17 there are all sorts of arrangements that can be made, fine, but  
 18 having elected to stay out of it as long as you did, and I know it's  
 19 not you, but it was your client, having this arrangement going  
 20 forward and having the situation that it is, I'm not going to order  
 21 that they permit you to attend the parties.

22       *Id.*, Ex. A at 7:22-8:5.

23       Roots claims, however, that the Court did not prohibit Roots from "noticing third-party  
 24 depositions of third-party witnesses." *See* Opp. Mem. at 4. Roots should not be permitted to  
 25 circumvent the clear intent of the Court's Order prohibiting Roots from participating in those  
 26 depositions. Moreover, under Rule 26(d) of the Federal Rules of Civil Procedure, "a party may  
 27 not seek discovery from any source before the parties have conferred as required by Rule 26(f)." Fed. R. Civ. P. 26(d) (emphasis added). At the time Roots strong-armed its way into Mr.  
 28 Sokary's deposition, the parties had not met and conferred as required by Rule 26, and Roots had not (contrary to its prior representations) made a complete document production. Declaration of Rose Darling in Support of Gap's Reply on Motion for Protective Order, filed herewith, ("Darling Decl.") ¶¶ 3-4.

Furthermore, there is no reason to think that it would be inordinately difficult for Roots to obtain access to Mr. El Sokary on another date. At his deposition in the *Gabana v. Gap* matter,

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REDACTED

## Contrary to Roots'

assertion in its First Amended Complaint (“FAC”),

REDACTED

REDACTED

REDACTED

### *Compare*

REDACTED

REDACTED with FAC at ¶ 3. Indeed, it would be more apt to characterize Mr. El Sokary as a Roots witness than as a Gabana witness. Furthermore, Mr. El Sokary's testified at his September 12, 2007 deposition in the *Gabana v. Gap* matter that, REDACTED

REDACTED

REDACTED

REDACTED Given Mr. El Sokary's ongoing relationship with Roots, it is reasonable to expect that Roots would be able to arrange access to this witness in the future.

*Second*, not only did Roots show a complete disregard for the Court’s ruling by purporting to take Mr. El Sokary’s deposition, but it provided wholly inadequate notice to Gap of its intention to do so. Roots’ attempts to argue that Rule 32(a)(3) of the Federal Rules of Civil Procedure does not apply here are wholly unconvincing. Under Rule 32(a)(3), a deposition shall not be used against a party who received fewer than eleven-days notice of the deposition and promptly filed a motion for a protective order requesting that the deposition not be held or be held at a different time or place. In its opposition, Roots concedes that Gap received only eight days notice of its intention to take Mr. El Sokary’s deposition and Roots does not contest that Gap promptly filed a motion for a protective order after learning of Roots’ intention. *See Opp. Mem.* at 5. Roots is left in the untenable position of asserting that Rule 32(a)(3) should not apply to Roots’ deposition of Mr. El Sokary because Gap was prepared to depose that witness *in a different matter* on that day. The problem with that argument is that the two cases are different,

1 as the Court recognized in prohibiting Roots from participating in the Gabana depositions.  
2 Indeed, Roots had not completed its document production prior to the Paris depositions and  
3 recently conceded that it expects to make at least one additional substantial document  
4 production. Darling Decl. ¶ 4.

5 *Finally*, each of Roots' arguments as to why the notice was not premature fail. It is clear  
6 that the letter sent to Gap from Roots on August 8, 2007 in no way constituted a Rule 26(f)  
7 conference between the parties. Rule 26(f) requires that the parties "confer to consider the nature  
8 and basis of their claims and defenses and the possibilities for a prompt settlement or resolution  
9 of the case" and to "develop a proposed discovery plan that indicates the parties' views and  
10 proposals." A unilateral proposal for a deposition schedule does not constitute the type of  
11 conference between the parties contemplated by Rule 26(f) nor does it provide for the  
12 development of a discovery plan embodying the parties' views and proposals. Notably, no  
13 proposed discovery plan was ever submitted to the Court following Roots' August 8, 2007 letter.  
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15 In addition, Roots' assertion that the parties were engaging in ongoing discovery at the  
16 time of Mr. El Sokary's deposition is incorrect. *See* Opp. Mem. at 4-5. Out of an abundance of  
17 caution, Gap served Roots with early discovery in the weeks prior to the August 24, 2007  
18 hearing on Roots' motion to consolidate, which if granted would have left Gap in the position of  
19 having to cram all discovery in this case into a few short months. Contrary to Roots' assertion,  
20 there was no need for Gap to withdraw its requests after the Court denied Roots' motion: Gap  
21 informed Roots that it would treat its August discovery requests as having been served on  
22 September 20, 2007, the day the parties met and conferred under Rule 26(f). Darling Decl." ¶ 3,  
23 Ex. A. Thus, at the time Roots attended Mr. El Sokary's September 10th deposition, the parties  
24 had not engaged in any formal discovery. *Id.* ¶¶ 3-4. Accordingly, Roots' deposition notice was  
25 premature.  
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## I. CONCLUSION

Roots' participation at the deposition of Mr. El Sokary was a direct violation of the Court's August 24, 2007 ruling. Accordingly, Gap requests an order prohibiting Roots from presenting the testimony it elicited improperly from Mr. El Sokary at trial or in connection with any motion in this case, and any other such relief as the Court believes is necessary.

Dated: October 5, 2007

## KEKER & VAN NEST, LLP

By: /s/ Rose Darling  
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